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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 658.

PAUL SENN,

Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, CHARLES SCHREIBER, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION and INTERNATIONAL JURIDICAL ASSOCIATION, AMICI CURIAE.

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Statement.

The appellant attempts to challenge in this Court the constitutionality of Sections 103.51 to 103.63 of the Wis-

consin Statutes (Wis. Laws, 1931, c. 376; Laws, 1935, c. 551, s. 5—herein called the Wisconsin Labor Code), as construed and applied by the Supreme Court of Wisconsin in the decision appealed from, upon the ground that these sections, as so construed and applied, contravene the Fourteenth Amendment to the Constitution of the United States. The Wisconsin Labor Code, which regulates the issuance of injunctions in labor disputes, is patterned upon the federal Norris-LaGuardia Act (c. 90, 47 Stat. 70; U. S. C., title 29, secs. 101-115) and is a counterpart of like statutes which have been enacted, in whole or in part, in fifteen other states.* This brief is filed on behalf of the American Civil Liberties Union and the International Juridical Association, organizations which have cooperated for many years in the drafting of such legislation and in seeking its enactment in Congress and in the several State legislatures.

The constitutionality of the federal Act has been sustained by two federal Circuit Courts of Appeals and by one District Court. *Levering & Garrigues* v. *Morrin*, 71 F. (2d) 284 (C. C. A. 2), cert. den. 293 U. S. 595; *United Electric Coal Companies* v. *Rice*, 80 F. (2d) 1 (C. C. A. 7), cert. den. 297 U. S. 714; *Cinderella Theatre Co.* v. *Sign Writers' Local*, 6 F. Supp. 164 (E. D., Mich.). In no case in which

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*Idaho Laws, 1933, c. 215, page 452; Ind. Acts, 1933, c. 12, page 28; La. Acts, 1934, No. 203, page 600; Me. Laws, 1933, c. 261, page 439; Md. Laws, 1935, c. 574; Mass. Acts, 1935, c. 407, amended G. L. (Ter. Ed.), 149, 214 and 220 (1935); Minn. Laws, 1933, c. 416, page 477; N. Y. Laws, 1935, c. 477, page 1051; N. D. Laws, 1935, c. 247, page 350; Ore. Laws, 1933, c. 355, page 559; Pa. Laws, 1931, c. 311, page 926; R. I. Laws, 1936, c. 2359; Utah Laws, 1933, c. 15, page 25; Wash. Laws, 1933, Sp. Sess., c. 7, page 10; Wyo. Laws, 1933, c. 37, page 31. The Washington Statute was declared in conflict with a constitutional provision of that state relating to the jurisdiction of State courts. *Blanchard* v. *Golden Age Brewing Co.*, 63 Pac. (2d) 397 (Wash.).

state legislation has been challenged upon a federal constitutional ground has the challenge prevailed. *Fenske Bros.* v. *Upholsterers,* 358 Ill. 239, 193 N. E. 112, cert. den. 295 U. S. 734; *Starr* v. *Laundry Dry Cleaning Union,* 63 Pac. (2d) 1104 (Ore.); *Local Union No. 26* v. *City of Kokomo,* 5 N. E. (2d) 624 (Ind.); *American Furniture Co.* v. *I. B. of T. C. & H. of A.,* 268 N. W. 250 (Wis.); *Dehan* v. *Hotel & Restaurant Employees,* 159 So. 637 (La.); *Aberdeen Restaurant Corp.* v. *Gottfried,* 158 Misc. 785, 285 N. Y. Supp. 832.

It is our position, however, that the question of constitutionality which the appellant seeks to raise is not before this Court and that the appeal should, therefore, be dismissed. In the event that the Court should entertain the appeal upon the merits, it is our position that the single provision of the Wisconsin Labor Code conceivably involved is not in conflict with the Fourteenth Amendment.

POINT I.

The appeal should be dismissed.

a. The Decision Below Was Based Upon Non-federal Grounds. The Federal Question, If Any, Was Not Properly Presented.

A simple and familiar question of general law was presented to the trial court. The tile layers' and helpers' unions in Milwaukee had entered into agreements with numerous building contractors in that city (R., 84) governing wages, hours and working conditions (R., 27). All such agreements included a provision preventing any employer from working as a tile layer or helper (R., 26), a provision which the trial court found was intended to protect the union members from competition with non-union tile layers and helpers (R., 28). The appellant declined to enter into such an agreement (R., 26) and the appellees patrolled his business premises with "two or four" of their members (R., 64, 40) carrying banners with

inscriptions, one stating that the appellant was "unfair to organized labor" and the other reading "Let the Union tile layer install your tile work" (R., 41). The sole question presented to the trial court was whether it was obliged to enjoin such conduct which, as it found, had been "peaceful, without violence, and without any unlawful acts" (R., 28).*

It is apparent that this question could have been decided upon principles of general law without reliance upon any statute. In *Zaat* v. *Building Trades Council*, 172 Wash. 445, 20 Pac. (2d) 589, the Court held it lawful for a union to publicize the fact that, as in the case at bar, an employer worked himself in violation of a union rule. In *Rorabeck* v. *Motion Pictures Machine Operators' Union*, 140 Minn. 481, 169 N. W. 529, a temporary injunction was denied by a trial court upon a similar state of facts and upon appeal, a majority of the court, while stating that the plaintiff might ultimately be entitled to an injunction upon proof of the facts alleged, held that "the right to and necessity for" the injunction was "not so conclusively established" as to require a reversal. In a concurring opinion, Judge Hallam specifically recognized the right of the defendants "to advise one another or the public that a certain employer does not employ union operatives or that he insists on operating his own machines." In *Hughes* v. *Motion Pictures Machine Operators' Union*, 282 Mo. 304, 221 S. W. 95, appeal dismissed, 257 U. S. 621, it was the view of three out of seven judges of the Supreme Court of Missouri that conduct similar to that herein complained of was not illegal at common law. And in *Finke* v. *Schwartz*, 28 Ohio (N. P.) 407, the court took the same view and denied an injunction.

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*The finding of the trial court that other acts complained of would not be committed or continued (R., 28, 29) is of course not here subject to review.

The record in this case shows that the case was tried and decided upon the very principles of general law applied in the authorities just cited. The trial court said (R. 24):

> "• • • the more recent trend of cases upholds the contention of the defendant that the injunction should not be issued. • • • I feel very much inclined to adopt the concurring opinion in Rorabeck vs. Motion Pictures Machine Operators' Union, cited by plaintiff. I consider that decision correctly states the rule controlling in this case."

In short, the trial court found what it considered to be "the controlling rule" in judicial doctrine and not in any statute.

The complaint in this case did not challenge the validity of any statute; the answer did not rely upon any statute to justify the conduct complained of. Nor can the appellant rely upon any assignment of error from the trial court to the Supreme Court of Wisconsin, since no assignments of error to the Wisconsin Supreme Court appear in the record. Finally, the prevailing opinion of the Supreme Court of Wisconsin makes no reference to the specific provision of the Wisconsin Labor Code which the appellant now seeks to challenge.

It is clear that the challenge here is not to a statute but to a judicial decision based upon principles of general law which have been approved by some judges and disapproved by others. But it is settled doctrine in this Court that "The due process clause does not enable this court to revise the decisions of the state courts upon questions of state law". *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 166; *Brown* v. *United States*, 159 U. S. 100, 112.

The only reference to the provisions of the Wisconsin Labor Code here sought to be questioned which was made by the Supreme Court of Wisconsin appears in its brief

statement denying appellant's petition for a rehearing. But "a statement of a state court by way of amendment of, or addition to, the record" to the effect that a federal question has been presented to it and necessarily passed upon is not controlling. *Honeyman* v. *Hanan*, 57 Sup. Ct. 350; *Powell* v. *Supervisors Brunswick Co.*, 150 U. S. 433, 440. In the case last cited, the Court said (p. 440):

> "• • • resort cannot be had to the expedient of importing into the record the legislation of the State as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusions upon the matters actually presented and considered."

b. If It Be Argued that the Decision Below Was Based Upon a Federal Ground, We Have Shown that It Is Also Based Upon an Alternative Independent Non-federal Ground Broad Enough to Sustain the Judgment.

It is settled by decisions of this Court that, although a federal question is decided by a state court, if it also appears that its judgment was "based upon a question of general law broad enough to support the decision, this court will not consider the Federal question, though it was considered and determined by the court below adversely to the plaintiff in error." *Consolidated Turnpike Company* v. *Norfolk, etc., Ry. Co.*, 228 U. S. 596, 599; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164.

c. Even if the Decision Appealed from Had Been Based Solely Upon the Provision of the Wisconsin Labor Code Here Sought to be Questioned, the Appellant Has Failed to Show and Cannot Show that He Is Injured by this Provision.

This Court has frequently announced the rule that an appellant seeking to challenge the constitutionality of a statute has the burden of showing that he is "harmed through the operation of the statute challenged as unlawful." *Stockholders of Peoples Banking Co.* v. *Sterling*, 57 Sup. Ct. 386, 390; *In re Matter of 620 Church Street Building Corporation*, 299 U. S. 24, 27. There is nothing in this case to show that the provision of the Wisconsin Labor Code here sought to be questioned is not merely declaratory of the general law as it existed in Wisconsin prior to the statute or that the case would have been decided in appellant's favor in the absence of statute. In *Truax* v. *Corrigan*, 257 U. S. 312, discussed below, the Arizona statute complained of sought to legalize conduct which prior to the statute "was unlawful in Arizona" (257 U. S., at p. 323).

d. There Is Nothing in the Record to Show that the Appellant Is Damaged or Will Be Damaged by the Acts Complained of.

There is not a scintilla of evidence in the record to show that the appellant has lost or will lose any business or will otherwise be damaged in any property right as a result of the conduct of the appellees. In fact, the appellant testified that he "really never paid much attention to" the picketing; that he did not believe there was any picketing subsequent to December 30, 1935, the date upon which the action was instituted (R., 64). For all that appears the public may not have responded to the union campaign

and the appellant may suffer no damage whatever from the acts which the Wisconsin court refused to enjoin. This Court has frequently pointed out that "one who would strike down a state statute as violative of the Federal Constitution must show . . . that the alleged unconstitutional feature injures him". *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544, 545; *In re Matter of 620 Church Street Building Corporation*, 299 U. S. 24, 27.

e. Under Any View of the Case the Appeal Should Be Dismissed for the Want of a Substantial Federal Question. *Lukens* v. *Pennsylvania*, 290 U. S. 597 (upholding a gross-receipts tax on business of transporting freight and passengers over the highways, from which were exempted taxis and motor busses); *Rippa & Battle Co.* v. *State Industrial Board*, 291 U. S. 646 (statute providing that actual earnings of injured workmen rather than their earning capacity be made the basis for fixing compensation, as applied to a workman who had declined an offer of higher wages).

POINT II.

The only provision of the Wisconsin Labor Code conceivably involved in this appeal is not in conflict with the Fourteenth Amendment.

The Wisconsin Labor Code, enacted in 1931 for the purpose of promoting the State's public policy as to collective bargaining, is a comprehensive statute regulating the issuance of injunctions in labor disputes. Apart from the statutory declaration of public policy found in Sections 103.51 and 103.55, this case can only involve a portion of but one section of the Code—namely, Section 103.53, which provides, so far as pertinent, as follows:

> "(1) The following acts, whether performed singly or in concert, shall be legal:
>
> • • • • • •
>
> (e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;
>
> • • • • • •
>
> (l) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.
>
> (2) No court, nor any judge or judges thereof, shall have jurisdiction to issue any restraining order or temporary or permanent injunction which, in specific or general terms, prohibits any person or persons from

doing, whether singly or in concert, any of the foregoing acts."*

No other provision of the Wisconsin Labor Code is before this Court, for "a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage". *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289. No constitutional question will be decided "in advance of the necessity of deciding it". *Wilshire Oil Co.* v. *United States*, 295 U. S. 100; *Tennessee Publishing Co.* v. *American National Bank*, 299 U. S. 18, 22.

The appellant must show that "the alleged unconstitutional feature injures him". *Heald* v. *District of Columbia*, 259 U. S. 114, 123. How has this appellant been injured by the alleged unconstitutional feature? He has been denied an injunction to restrain "two or four" persons (R., 64, 40) from patrolling his office (R., 44) with banners stating in substance that he is unfair to the union (R., 41)**. Surely, such conduct is not intrinsically unlawful. It has too frequently been sustained by courts as conduct permissible regardless of the existence of a strike to justify this Court in invalidating a statute which does no more. *Exchange Bakery & Restaurant, Inc.*, v. *Rifkin*, 245 N. Y. 260, 263, 157 N. E. 130, 132; *Wise Shoe Co.* v. *Lowenthal*, 266 N. Y. 264, 194 N. E. 749; *Steffes* v. *Motion Picture*

*Section 103.56, subdivision (d), of the Wisconsin Labor Code, which requires that prior to the issuance of an injunction in a labor dispute, a finding must be made that the relief to be granted does not violate the provisions of Section 103.53, obviously does not extend the scope of the statute.

**While other acts were committed or threatened, the trial court found that such acts would not be committed or continued (R., 28, 29) and the decision of the Supreme Court of Wisconsin upholding the discretion of the trial court in this finding (R., 122) is of course binding upon this Court.

Mach. Operators Union, 136 Minn. 200, 161 N. W. 524; *Blumauer* v. *Mov. Pic. Mach. Operators' P. Union,* 141 Ore. 399, 17 Pac. (2d) 1115; *Kirmse* v. *Adler,* 311 Pa. 78, 166 Atl. 566.

Was the purpose of the union such as to render the conduct itself illegal? By this conduct the union sought to appeal to the public to refrain from patronizing the appellant while he refused to enter into a union agreement under which, as an employer, he might not work as a tile layer or helper. Convincing support for the reasonableness of the union rule is found in the record. The evidence adduced at the trial and the court's findings of fact (R., 28, 71-76) show the unemployment caused by the demoralized condition of the tile laying industry, the intense competition between union and non-union tile workers, and the understandable efforts of union workers to defend agreements and advantages obtained in respect of wages, hours and working conditions against the appellant and others who, by themselves working in the place of tile layers and helpers—and working more than the standard union day and on Sunday (R., 71)—and who, by paying their employees "considerably less than the union scale" (R., 73), were enabled to bid for work "at a lower rate than those who pay the union rate" (R., 76, 90). Surely, the union's purpose to remedy such a situation by lawful means was not illegal. Such a purpose has too much judicial sanction to permit this Court to hold that a statute which goes no further is invalid. *Zaat* v. *Building Trades Council,* 172 Wash. 445, 20 Pac. (2d) 589; *Finke* v. *Schwartz,* 28 Ohio (N. P.) 407; Hallam, J., concurring in *Rorabeck* v. *Motion Pictures Machine Operators Union,* 140 Minn. 481, 169 N. W. 529; Blair, J., dissenting in *Hughes* v. *Motion Picture Machine Operators,* 282 Mo. 304, 332, 221 S. W. 95, 122, appeal dismissed, 257 U. S. 621; compare *H. R. H. Construction Corporation* v. *Franklin,* 236 App. Div. 536, 261 N. Y. Supp. 43.

In view of the settled rule of this Court that the Fourteenth Amendment invalidates legislation only so far as "the means selected" are "unreasonable, arbitrary or capricious" and have no "real and substantial relation to the object sought to be attained" (*Nebbia* v. *New York*, 291 U. S. 502, 525), there should be little question of the constitutional support of the provision of the Wisconsin Labor Code involved in this appeal. The only possible challenge derives from *Truax* v. *Corrigan*, 257 U. S. 312.

(a) The Truax Case Does Not Govern This Case.

1. *The Truax Decision on "Due Process" Is Inapplicable.*

First. The Arizona statute invalidated in the *Truax* case legalized conduct which the Supreme Court of Arizona had declared unlawful prior to the passage of the statute. In fact, all picketing had theretofore been unlawful (257 U. S., at p. 323). In Wisconsin, on the other hand, peaceful picketing has never been rejected as a lawful and legitimate means for the protection of the right of labor to bargain collectively. Therefore, the present case, unlike the *Truax* case, could have been decided upon the *judicial* authority cited on page 4 without reference to statute.

Second. The conduct which the Arizona Court held had been legalized by the statute was conduct "the illegality" of which this Court characterized as "without doubt and fundamental" (Ibid., p. 330). There were libelous attacks and abusive epithets against the employer and his friends; libelous and disparaging statements against the plaintiff's business; threats and intimidation directed against customers and employees. This was not, *as the conduct in the case at bar was*, "lawful persuasion or inducing", "a

mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage" (Ibid., pp. 327-8); it was "an admitted tort" (Ibid., p. 337). It is understandable why this Court held that the conduct in the *Truax* case was not conduct "as to the illegality of which courts have differed and States have adopted different statutory provisions" (Ibid., p. 330). It is understandable why this Court concluded that the Arizona statute sanctioned "a wrongful and highly injurious invasion of property rights" (Ibid., p. 329). The Court said (Ibid., p. 327):

> "The real question here is, were the means used illegal? The above recital of what the defendants did, can leave no doubt of that. The libelous attacks upon the plaintiffs, their business, their employees, and their customers, and the abusive epithets applied to them were palpable wrongs."

And Mr. Justice Pitney, in his dissenting opinion, admitted (p. 346):

> "Upon the facts, it hardly could be said that defendants kept within the bounds of a 'peaceful' picket or boycott. They appear to have gone beyond mere attempts to persuade plaintiffs' customers to withdraw their patronage, and to have resorted to abusive and threatening language toward the patrons themselves."

Final proof that the *Truax* case would have been decided differently if it had merely involved conduct like that in the case at bar is the opinion of this Court rendered at the same term in *American Steel Foundries* v. *Tri-City Central Trades Council* (257 U. S. 184, 209):

> "'• • • they may use all lawful propaganda to enlarge their membership and especially among those

whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious."

2. *The Truax Decision on "Equal Protection" Is Inapplicable.*

Upon the assumption that the Arizona statute affected only the injunctive remedy, the majority held that the employer was denied the equal protection of the laws. The reason advanced was that there was withheld from the employer the use of a remedy in this type of dispute which might have been available to him in any other type of dispute—that, in short, he was entitled to the same number of remedies in a dispute no matter of what character.

First. The Wisconsin statute applies not only in a labor dispute between an employer and employees, but as well to disputes (a) between an employer and other employers and (b) between employees and other groups of employees. Wisconsin Statutes (1935), Section 103.62. It is not only the employer in a dispute with employees who may find the range of legal remedy narrowed; the same limitation governs employees in contests with other employees and employers in contests with other employers engaged in the type of dispute defined by the statute. The prototype federal statute has indeed been held applicable to a case in which the Government was the complainant. *United States* v. *Weirton Steel Co.*, 7 F. Supp. 255, 262 (D. C., Del.).

Second. As we have already pointed out, there is nothing to show that the denial, if any, of equal protection to this appellant is a denial for which a statute alone is re-

sponsible. Judicial precedent (p. 4) has arrived at the same result.

Third. The breadth given to the equal protection clause by the majority, involving as it did a guarantee that no person would have fewer remedies against one class of tort-feasors than he had against other classes, was criticized as unsupportable on principle or authority in the dissenting opinion of Mr. Justice Pitney, in which Holmes, Clarke and Brandeis, JJ. concurred (Ibid., pp. 350-351). The effect of such a rule is that no person may be unequally protected as against himself. Such a doctrine has never been reannounced in any decision of this Court. On the contrary, a recent case (*Seaboard Air Line Rwy.* v. *Watson,* 287 U. S. 86) has recognized that state legislation may properly, and consistently with the equal protection clause of the Fourteenth Amendment, subject a plaintiff to more onerous burdens in certain types of litigation than in others.

Fourth. As we shall next show, economic, industrial and legal developments since the *Truax* decision have made reasonable the classification found arbitrary and without basis by the majority in that decision.

(b) The Provision of the Wisconsin Labor Code Involved in This Case Is Not Unreasonable, Arbitrary or Capricious; It Represents a Reasonable Treatment of Acknowledged Abuses in the Use of Injunctions in Labor Disputes.

The use of the injunction in labor disputes has been a subject of bitter political debate for more than a generation. The abundant Congressional attempts between the years 1898-1914 to remedy acknowledged abuses have been summarized by Mr. Justice Brandeis. *Truax* v. *Corrigan,* 257

U. S. 321, 369. The enactment of the Clayton Act in 1914 did not end the causes of controversy. The Act proved inadequate. Popular dissatisfaction and resentment did not abate. See Frankfurter and Greene, *The Labor Injunction* (1930), ch. IV. In 1928 extensive hearings were again begun by the Senate Committee on the Judiciary (70th Congress, 1st Session, Hearings on S., 1482) and in 1932 Congress enacted, and President Hoover signed, the so-called Norris-LaGuardia Act (c. 90, 47 Stat. 70; 29 U. S. C., Sec. 101-115). This Act served as the model for state legislation enacted in whole or in part in sixteen states to meet the same mischiefs (see footnote to p. 2). What were these mischiefs?

> "The history of the labor injunction in action puts some matters beyond question. In large part, dissatisfaction and resentment are caused, first, by the refusal of courts to recognize that breaches of the peace may be redressed through criminal prosecution and civil action for damages, and, second, by the expansion of a simple, judicial device to an enveloping code of prohibited conduct, absorbing, en masse, executive and police functions and affecting the livelihood, and even lives, of multitudes. Especially those zealous for the unimpaired prestige of our courts have observed how the administration of law by decrees which through vast and vague phrases surmount law, undermines the esteem of courts upon which our reign of law depends. Not government, but 'government by injunction', characterized by the consequences of a criminal prosecution without its safeguards, has been challenged." Frankfurter and Greene, *The Labor Injunction* (1930), page 200.
>
> "In form, the labor injunction was vague and of imperilling ambiguity; in content it subjected the most conventional trade union activities to the dangers of

contempt; in result, it sometimes paralyzed the exercise of unquestioned right and sometimes incited men to violence, but uniformly it bred in masses of our people hostility to the federal courts and undermined confidence in the administration of law as even-handed justice." Frankfurter and Greene, *Congressional Power Over the Labor Injunction,* 31 Columbia Law Review 385, 404 (1931).

The complaint which has been heard so continuously in legislative halls, and to which so-called anti-injunction legislation was a response, stems from the basic contention by working men that recognition of labor's abstract right to organize necessarily implies recognition and sanction of labor's concrete right to use, among other economic measures, the appeal for public support in its controversies with employers. It is the public, labor contends, and not the courts, which should judge of the merits of its position in a specific labor dispute. So long as labor, in appealing to popular judgment, conducts itself peacefully and commits no acts intrinsically illegal, it should be free from the restraining hand of courts.

Such is the underlying assumption, not only of the legislation involved in this case, but of the corresponding legislation of other states and of the Norris-LaGuardia Act. Such is also the underlying assumption of other legislation enacted by Congress. We refer to the Railway Labor Act of 1926 (c. 347, 44 Stat. 577) and the amendments thereto of 1934 (c. 691, 48 Stat. 1185); to the Bankruptcy amendments of 1933 and 1934 (c. 204, 47 Stat. 1481, sec. 77 [p] and [q]; c. 424, 48 Stat. 922; U. S. C. title 11, sec. 207 [l] and [m]); to the Act for the coordination of interstate railroad transportation (c. 91, 48 Stat. 214; U. S. C. title 49, sec. 257 [e]); to the National Labor Relations Act (c. 372, 49 Stat. 449; U. S. C., title 29, sec. 151, *et seq.*). Each of these legislative acts flows from express recognition that

legislation which strengthens and implements labor's right to organize is vital to the public interest. Each of these legislative acts is irrefutable evidence that special legislative treatment of labor's right to organize is appropriate and well within the field of permissible classification.

And this Court has, in a unanimous opinion, sanctioned such treatment. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548. In that case labor's right to organize came into conflict with the employer's "normal exercise of the right to select its employees or to discharge them" (Ibid., p. 571). The conflict was resolved in favor of legislation which curtailed the "normal" right of the employer and gave significance to the right of labor to organize.

Nor have legislators, including the Congress of the United States, been content to leave to implication a public policy "equalizing the bargaining power of labor and leaving the determination of wages and working conditions to the play of economic forces". *American Furniture Co.* v. *I. B. of T. C. and H. of A.*, 268 N. W. 250, 262 (1936). The public policy itself has been given the force and standing of an express enactment.*

Applied to the case at bar, this public policy means that so long as the conduct of the union is not intrinsically unlawful and so long as its purpose is not malicious, a court should not intervene and judge of the economic issues by injunction. Without the support of any statute, a great Court has said:

> "If the defendant believes in good faith that the policy pursued by the plaintiff and by the shops united with the plaintiff is hostile to the interests of organized

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*U. S. C., title 29, sec. 102; Wis. Stat. (1935), 103.51, 103.55. See statutes cited in the footnote to page 2.

> labor, and is likely, if not suppressed, to lower the standards of living for workers in the trade, it has the privilege by the pressure of notoriety and persuasion to bring its own policy to triumph" (*Nann* v. *Raimist*, 255 N. Y. 307, 314, 174 N. E. 690, 693 [1931]).

The conduct in the case at bar is a peaceful patrol by two or four persons; its purpose is to acquaint the public with the fact of a labor dispute. In *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, this Court, confronted not with the more difficult question of permissible state doctrine but with the simpler question of desirable federal doctrine, said (Ibid., p. 209):

> "Union was essential to give laborers opportunity to deal on equality with their employer. • • • To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious."

State legislation of the character here involved has now been sustained in six states (p. 3).

POINT III.

No provision of the Wisconsin Labor Code other than that directly involved in this appeal is before this Court.

The appellant in his assignments of error to this Court (R., 2) has properly attempted to challenge only the Wisconsin Labor Code as construed and applied to him in this case. That application merely involves the propriety of the peaceful patrolling of his place of business by two or four persons for the purpose of announcing to the public that he refuses to sign an agreement under which he could not work as a tile layer or helper while himself an employer. The only relevant provision of the Wisconsin Labor Code is that quoted on page 9 of this brief. That provision is clearly not so "inseparably connected" with the remainder of the labor code that it could not "operate without" it. *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 490; *Berea College* v. *Kentucky*, 211 U. S. 45, 55-56.

The intention of the Wisconsin legislature is specific as to separability. Under Section 103.63 of the Wisconsin Statutes, if any provision of the Wisconsin Labor Code "or the applications thereof to any persons or circumstances is held invalid, the remainder of these sections and the applicability of such provisions to other persons or circumstances shall not be affected thereby." While such a provision is not an "inexorable command", it "clearly evidences the intention" of the legislature "not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the Act which would render them invalid should not be indulged." *Crowell* v. *Benson*, 285 U. S. 22, 63; *Utah Power and Light Co.* v. *Pfost*, 286 U. S. 165, 184.

CONCLUSION.

The appeal should be dismissed or the judgment of the Supreme Court of Wisconsin affirmed.

Respectfully submitted,

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